United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7171

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No. 76-7171

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P/S

SEA-LAND SERVICE, INC., *et al.*,

Plaintiffs-Appellants,

—against—

AETNA INSURANCE COMPANY, *et al.*,

Defendants-Appellees.

ON APPEAL BY SEA-LAND SERVICE, INC. FROM A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT SEA-LAND SERVICE, INC.

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Statement

The brief for Defendants-Appellees is an example of the sort of smoke screen laid down by the attorneys from the beginning to make a complex issue out of what was in fact a *simple* and *classical* General Average situation. The attorneys have a genius for quoting testimony only in part and out of context and for shifting emphasis as they go

along. This sort of thing led the trial judge to find no claim at all for General Average was established (86a), not withstanding the fact that he found the vessel was seaworthy and that no fault on the shipowner's behalf caused the grounding (85a). In trying to deal with the question of damages *raised* about the loss to the bottom, the judge forgot the items of damages that were not questioned. This confusion on the Court's part resulted, as will be explained below, because defendants got Rule 5 and Rule A of the York-Antwerp Rules mixed up. To straighten things out, defendants prepared and submitted a judgment in favor of plaintiffs for $54,231.17, plus interest (91-93a).

They recognized that a General Average situation had been proven. Plaintiffs now appeal from that judgment in their favor, saying they should have recovered more, i.e., the bottom damage. Defendants did not appeal from these findings of law and fact made against them, i.e., that the vessel and the tow line were seaworthy and the shipowner was not negligent.

A brief review of what started out as a simple and classical General Average situation may be helpful:

The situation was that the vessel went aground on the breakwater at Rio Haina and it was conceded that the vessel and cargo were in common peril of being lost on the rocks, as was another vessel whose wreck still remained at the same spot. It was also conceded by defendants, insurance companies, that efforts made by the shipowner at its sole expense to preserve the imperilled property were eventually successful and that the cargo was saved without a scratch, although the vessel sustained damage to her bow when she first grounded and additional damage to her bot-

tom after a tow line parted. The shipowner declared general average. It made no claim for damage sustained by the bow when the vessel first grounded for that was particular average. It claimed as general average the expenses and losses incurred by the shipowner in the effort to save the vessel and cargo, including the damage to the bottom. A professional General Average Adjuster was duly appointed to examine the facts and to determine contributions if a general average situation was found according to the York-Antwerp Rules 1950, which were incorporated in the bills of lading. Mr. Myerson, in his professional capacity, determined that there was indeed a general average situation and he duly prepared the Adjustment, dividing the loss (including the bottom damage) between the cargo, vessel and freight.

The cargo interests in this case, or rather their insurance companies, refused to pay any contributions at all. The reasons given for refusal to honor the guarantees, given by the insurance companies to the carrier when shipments were delivered free of liens, varied from time to time but they eventually boiled down to the following:

(1) The plaintiff failed to exercise due diligence to furnish a seaworthy vessel for the voyage in question;

(2) The towing hawser was old and rotten;

(3) The shipowner's representative interfered with the navigator by ordering the ship to come into port at a dangerous time, and that even if (1), (2), (3) were not true (as they were not), and General Average was in order, that part of damage caused to the bottom when the vessel drifted to position B after the line

parted was not recoverable because there was no voluntary sacrifice and expenses incurred before the vessel moved to position B were not recoverable as efforts to prevent her from moving had failed. (See pre-trial order (52-54a.)

When the General Average Statement was offered by plaintiff's counsel at the trial, defendants objected unless the General Average Adjuster was called (152a). Mr. Myerson was in court as an observer, but he willingly testified (154a).

The General Average Adjuster pointed out that cargo interests had been mistaken in dealing with the case as a Rule 5 situation, as that Rule applies only to ships *intentionally* run aground (155-160a).

Rule 5 reads:

VOLUNTARY STRANDING

When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably drive on shore or on rocks, no loss or damage caused to the ship, cargo and freight or any of them by such intentional running on shore shall be made good as general average, but loss or damage incurred in refloating such a ship shall be allowed as general average.

In all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average.

Mr. Myerson, as an experienced professional General Average Adjuster gave his opinion that this was a valid General Average situation under Rule A (158a).

Rule A reads:

> There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.

Mr. Myerson explained that after the vessel was refloated and her bottom was examined in dry dock, Mr. Ganley, the architect employed by Sea-Land to inspect the bottom, (cargo interests refused to attend) reported that a clear pattern could be noted distinguishing the longitudinal (fore and aft) damage caused at the bow when the vessel plowed onto the rocks and leaned against the wreck of the tanker with her port bow, (particular average not involved here), and the sideways (athwartship) scarring of her bottom plates suffered as the vessel moved to port after the tow line parted. (164-165a) Mr. Ganley further reported that this latter damage (E-106, 107) appeared to be sustained in "refloating", e.g., General Average damage (165a). Mr. Myerson had to decide whether to allow the bottom damage as General Average. He explained how he arrived at the conclusion that it was (165-166a):

> The Witness: Yes. It became up to me as a professional stater of averages as—not all refloating damages are allowable but the question is whether this damage was.
>
> Upon getting further opinion judging from the pattern we found on the vessel's bow was that the vessel would have remained pretty much immovable in her first stranding position A other than for the fact as

the tug was coming out there was a slack on the tow line and the tug picked up the slack on the tow line and broke the tow line.

I also asked the question if she had remained firm would she have had this damage and they said no.

I then asked what would happen if the tow line had not parted, she would have come cleanly off and we would have had only the damage, assuming nothing else happened, we would have had the damage forward of the No. 1 hatch.

Consequently, based on this and in my best professional opinion I stated this is general average.

It is obvious that when the ship ran aground, neither the Captain, nor the pilot nor the tug captain knew what was going on under the sea where the ship was aground. They all naturally feared that the east-north-east weather was going to swing the stern of the ship to the port onto the rocks of the breakwater, and that the Beauregard would meet the same fate as the tanker (lying broadside to the breakwater) against whose skeleton the Beauregard's port bow was then resting. Had they been able to go down and inspect the bottom at that moment, they would have seen what Mr. Ganley, the naval architect, clearly observed later on when he inspected the vessel in drydock and they would have realized that the way the bow was jambed into the breakwater and against the wreck, the vessel could not have moved to port. The Captain wisely conceded that "I didn't know what was in there" (401a). Architect Ganley wrote to Mr. Myerson May 9, 1969, (E 106-107):

The Opinion which I formed while surveying the damaged plating was that certain damage had been

sustained forward during the first grounding, that all the rest of the bottom damage had been sustained during bumping and sliding or grinding sideways while attempting to back clear and that by the time the vessel came to rest in her second position all the bottom damage had been done except for the bilge damage caused by rocking or rolling the vessel by use of the cranes.

* * *

'Bottom plate markings showed heavy fore and aft scoring up forward, and after a section of undamaged plating, the rest of the bottom showed only a sideways motion to port combined with what appeared to have been a vertical bumping that set the plates and floors up bodily.

* * *

'You may note that the survey report includes the statement 'At the forward end the damage showed that the vessel had grounded with forward speed, longitudinal scraping being noted as high as the 6-ft. waterline on both sides of the stem.' During the unsuccessful efforts to refloat, *with the ship free to pivot* the sea *only caused a change of heading of 18 degrees.* I think these two observations show that had the vessel not tried to refloat when and as she did, she would have remained firmly fixed by the bow and would have suffered no further damage." (Emphasis added.)

Mr. Ganley's conclusion that the vessel would not have moved is supported by *physical facts* which are indisputable but which the Judge failed to recognize:

1. The vessel stem was buried 6′ deep in the blocks of concrete that made up the breakwater. She could not have moved port without breaking off her bow.

2. The Beauregard's Port Bow was resting against the wreck. She could not have moved to port without displacing the tanker (Pl. Ex. 2A and 2C, at E5-E6).

3. From the time she grounded to the time the tug started to pull, she had not moved. Had her stern been pushed to port by the weather, her starboard bow plates would have shown signs of damage against the rocks, but they did not (E-40-41).

4. The weather moderated after the 1813 grounding, the wind dropping from force 5-7 at 1800 to force 2 at 0200 (Pl. Ex. 3, Log, at E-9 and E-10).

Thus the Court's Findings of Fact, Number 8 (86a), that,

> It is more likely than not that the ship would have shifted roughly to 'position B', regardless of whether the tow had been attempted,

is clearly erroneous. The photograph on the last page of the Exhibit volume (Def. Ex. T, E-115) shows the path the Beauregard took as she dragged to port around the tanker after her bow cleared the wreck, and shows the vessel in position B. This, of course, occurred *after* the tug had pulled her off the rocks and clear of the tanker and *after* the tow line broke.

The Judge's finding No. 9 (86a) that,

> In light of finding 8, had the tow not been attempted *at least* the damage actually suffered would have occurred. (Emphasis added)

is also clearly erroneous, speculative, and not controlling as a matter of law. His test that no General Average claim may stand if "it is more probable than not that the damage actually suffered would have occurred," has no basis in law, misses the whole point of the reason for General Average in maritime law and, in fact, shows a misconception of what the seafarers who experienced the grounding really feared.

No witness testified that he feared the vessel would move from spot "A" to spot "B". They would have to have been clairvoyant to foretell exactly where the vessel would end up if nothing was done. Defendant's counsel kept pounding on "A" and "B", in questioning the witnesses, but a full reading of the testimony shows clearly that what they feared was not that the vessel would simply move to a spot designated as "B", but that she would pile on the rocks like the other tanker, break up, and that all would be lost.

Obviously, if that had happened, "*at least* the damage actually suffered would have occurred." That *only* the damage actually suffered by the vessel, did occur, is why the shipowner's efforts that succeeded in saving the vessel and cargo from a general disaster constitute General Average.

Defendant's brief, in arguing that if nothing had been done, the vessel would have been moved from "A" to "B" by the weather anyway, quotes Captain Boehm, out of context. Captain Boehm is quoted as follows (p. 11, Defendant's brief):

> Q Right, if nothing were done, she would have come right around to where she did end up?
>
> A Yes, that's true. Maybe worse. I didn't know what was in there.

That the Captain was not worried about a theoretical position B but *worse,* is explained in the next question and answer, not quoted by the brief:

> Q You knew there was a tanker there and that was danger?
>
> A Yes, but while she was swinging around, what was in there—suppose she swung around and capsized? (401a).

Also not quoted was the following testimony by the Master (328a).

> Q . . . What did you fear over all might happen if nothing were done?
>
> A Well, I feared that there was a wreck already there alongside the breakwater and—
>
> Q Is that the drawing of the ship broken in half on that Coast Guard map?
>
> A Yes, sir. I figured that the stern would swing right around and land right up there where it was and the ship would be broken up.
>
> * * *
>
> (329a-339a)
>
> Q So can we reasonably say that what happened is what you feared would happen? Is that a fair statement, sir?
>
> A Well, I figured it would be even worse than that.

Pilot Torres was also of the opinion that if nothing was done "the ship was going to hit against the rocks." (417a)

Captain Rojo is quoted in Defendant's brief as follows (Def. Brief p. 12):

Q In your opinion had you not made an attempt to pull the vessel off the rocks would it have gone westerly to this position that it eventually found itself in, anyway?

A Yes, the ship was going to that position because of the wind and the heavy seas, anyway.
(450a, 11. 8-20).

Defendant's brief does not quote the following testimony of Captain Rojo (470a-471a):

Q In your opinion if this effort had not been made what would have happened to the Beauregard?

A That he never left from there and it could happen the same to the . . . as the other.

Q The tanker that is sunk at the mouth of the harbor, is that what you mean by the other?

A Yes, because if they didn't make the effort to take him from this place he will. It would remain in that place.

POINT I

Rule C of the York-Antwerp Rules—1950 is not relevant to this appeal because the Acts necessary to satisfy Rule C's "Direct Consequence" test are not contested.

If the Appeal is viewed at the proper point in the progression of the proof of General Average it is clear that the damage in question was a foreseeable result of the towage attempt and thus a "direct consequence" of it for the purpose of the Rule C requirement.

Rule C, reads as follows:

> Rule C. Only such losses, damages or expenses which are the *direct consequence* of the general average act shall be allowed as general average.
>
> Loss or damage sustained by the ship or cargo through delay, whether on the voyage or subsequently, such as demurrage, and any indirect loss whatsoever, such as loss of market, shall not be admitted as general average. (Emphasis added).

Defendants gloss over the well settled definition of Rule C direct consequence, a *foreseeable result* of the General Average Act. Defendants attempt to, and if they hope for success in this appeal, need to create new law to interpret Rule C's direct consequence requirement as a strict rule that damage must look to, *and only to,* the General Average Act for its genesis. According to defendants, the damage cannot be related in any way to the peril. Such an interpretation would eliminate the entire theory of both General Average and Intervening Cause as explained in PROSSER,

LAW OF TORTS §51 at 309 (3rd Ed. 1964); and RESTATEMENT OF TORTS §441.

In addition, defendants' argument is contrary to the clear meaning of the Rule. Had the entire Rule C been quoted in defendants' brief, it would have been apparent that only such damage as demurrage and loss of market was meant to be excluded by the direct consequence requirement. Surely the Rule does not mean to exclude damage to a ship's bottom inflicted during the salvage operation.

The law of General Average is clear that,

> . . . all losses and damages which may reasonably be considered as fairly within the contemplation of the Master at the time of the general average act, *or* are its natural and immediate result, are treated as direct consequences of the original act, and irrespective of whether the losses or damages exceeded his intention or expectation.

BUGLASS, GENERAL AVERAGE and THE NEW YORK/ANTWERP RULES, 1950, at p. 15 (1959). (Emphasis Added.)

The above quote is not just an isolated comment, but reflects the well established law. Even before the York/Antwerp Rules were enacted, Mr. Justice Story, speaking for the Supreme Court, held that a foreseeable result, even though it was not an intentional result of a General Average Act, was a General Average sacrifice:

> But, then, the act is done for the common safety; and if the salvation of the cargo is accomplished thereby, it is difficult to perceive, why, because from inevitable calamity, the damage has exceeded the intention or expectation of the parties, the whole sacrifice should be borne by the ship-owner, when it has thereby accomplished the safety of the cargo.

Columbian Ins. Co. v. *Ashby,* 13 Pet. 331, 342, 38 US 286, 297 (1839).

Gourlie, GENERAL AVERAGE, THE LAWS AND CUSTOMS OF THE UNITED STATES, at p. 13 (1881) notes that *Columbia* v. *Ashby, supra,* held that all the necessary consequences of a sacrifice must be regarded as the sacrifice itself. Gourlie further noted that:

> It is extremely difficult to convey by any set rule the necessary limitation as to consequences applicable in cases of general average sacrifice; for the words "immediate," "direct," "necessary," &c., may all be subject to varied interpretation and the full scope of the rule be as vague as before.
>
> It may suffice to say, however, that not only all the necessary, but many of the unnecessary, consequences of the act may be regarded as the act itself.
>
> In regard to sacrifices not only the known but the conjectural, and in some cases the accidental results of the original sacrifice are considered to follow it as a logical sequence or extension of the intentional act.

Buglass equates the Rule C direct consequence with the kind of damage in question, a foreseeable result of the course of action taken:

> In practice, difficulty often arises in deciding what limitation is to be put on the phrase, "the direct consequence of the general average act." In each case it is, of course, a question of fact and must be decided in the light of the circumstances prevailing in that par-

> ticular instance. A general average act carries with it all its natural, immediate, reasonable and necessary consequences. *If a specific loss was contemplated by the master as a possible result of the general average act, such contemplation would be conclusive.* However, the fact that the master did not foresee all the consequences of the general average act does not in itself bar these consequences from being treated as general average. In such cases, it should then be considered whether the loss might reasonably have been anticipated. If so, the loss is directly consequential on the general average act and is recoverable in general average. On the other hand, where the sequence of cause and effect is broken by the intervention of a new, unconnected and unexpected peril, the loss cannot be said to be a direct consequence of the general average act.

Buglass, *supra,* pp. 15-16. (Emphasis added.)

The case law also equates direct consequences with foreseeability:

> If the master, when he does "the general average act" ought reasonably to have foreseen that a subsequent accident of the kind might occur—or even that there was a distinct possibility of it—then the subsequent accident does not break the chain of causation. The loss or damage is the direct consequence of the original general average Act.
>
> In both cases before us, *the master, when he engaged the tug, should have envisaged that it was distinctly possible that the tow-line might break and foul the propeller. When it happened, therefore, it did not break the chain of causation.*

Australian Coastal Shipping Commission v. *Green* (1971) 1 Ll. Rep. 16, 21 (Court of Appeals 1970). (Emphasis supplied); *See also*: *Columbian Insurance Co.* v. *Ashby,* 13 Peters 331, 38 U.S. 329 at page 342 (1839); *Anglo-Grecian Steam Trading Co., Ltd.* v. *T. Beynon & Co.,* [1926] 24 Lloyd's List L.R. 122 (1926).

The Master of the S.S. Beauregard did foresee the possibility which occurred:

> Q In asking the tug to take this line on your ship, did you consider the possibility that with those swells the line might part?
>
> A Oh, yes, whenever you run a line to a tow boat there is a possibility it might part.
>
> Q Did you consider that if the line parted your vessel might go into a worse position?
>
> * * *
>
> A Yes, sir, I did.
>
> Q Was that a risk that you took intentionally?
>
> * * *
>
> A Yes, I would say so. (378a-379a).

It is undisputed that the parting of the tow line could occur. Its occurrence is, therefore, a direct consequence of the sacrifice and the direct consequence requirement of Rule C is met.

POINT II

Defendants' assumption that a general average sacrifice cannot be caused by the energy contained in the peril is contrary to the very concept of General Average.

Defendants' attempt to make "new law" by arguing that, because the energy which forced the vessel sideward was the same energy contained in the original peril, it cannot be classified as a General Average sacrifice.

Apparently, defendants wish to revert to the old theory that an affirmative *jactus,* or casting cargo over the side, with energy not contained in the original peril, is necessary for a General Average sacrifice. They claim that narrowing the force of the peril to one part of a venture cannot classify as a General Average sacrifice. The United States Supreme Court rejected this theory as long ago as 1850.

Barnard et al. v. *Adams et al.,* 10 How. 270, 51 U.S. 285 (1850) concerned a sailing vessel which was caught in a storm in the port of Buenas Ayres. Her anchors dragged or were lost. It was inevitable that the vessel would be driven aground. To save the cargo and crew, the Master managed to sail the vessel up a river and ground her in a safer location. The crew and cargo were saved, but the vessel was lost. The defendants in that case argued the same theory as the defendants now before the bar urge. Because the loss of the vessel to the storm was inevitable, the stranding could not be a voluntary sacrifice.[1] The Su-

[1] The bottom damage to the Beauregard was not inevitable since she would have been towed free without damage had the tow line

preme Court rejected that argument with the following holding, which is still the law:

> . . . (I)f . . . there was an imminent peril of being driven 'on a rocky and dangerous part of the coast', when the vessel would have been inevitably wrecked, with loss of ship, cargo and crew, and that this immediate peril was avoided by voluntarily stranding the vessel on a less rocky and dangerous part of the coast, whereby the cargo and crew were saved uninjured, then (the jury) should find for the plaintiff.

Barnard v. *Adams, supra,* 10 How. at 302, 51 U.S. at 318.

That same case explained that a General Average sacrifice does not require an affirmative act, separate from the original peril as defendants now argue. Part of the ship or cargo may also be sacrificed by directing the force of the peril to one area so that remainder may be saved. This rule was explained by reference to the reservoir hypothetical at page 16 of Appellants' Brief.

The Supreme Court disregarded the same arguments now urged by defendants in the following language:

> But, as we have already seen, the intention to destroy the *jactus,* or thing exposed to loss or damage for the benefit of the whole, makes no part of the hypothesis upon which the right of contribution is founded. Indeed, the speciousness of this assertion seems to have

---

not parted. She might also have escaped the damage had a different method of salvage been attempted. Nevertheless, the damage was still a General Average sacrifice even if further damage was inevitable after the vessel grounded. The sacrifice decided which *part* of the vessel would be damaged.

> its force from the use of the word "sacrifice" in its popular and tropical, instead of its strict or technical meaning. The offering of sacrifices was founded on the idea of vicarious suffering. And when it is said of the *jactus,* that it is sacrificed for the benefit of the whole, it means no more than that it is selected to undergo the peril, *in place of the whole,* and for the benefit of the whole. It is made (if we may use another theological phrase) the "scape-goat" for the remainder of the joint property exposed to common destruction. The *"jactus"* is said to be sacrificed, not because its chance of escape was separate, but because of its selection to suffer, be it more or less, instead of the whole, whose chances of safety, as a whole, had become desperate. *The imminent destruction of the whole has been evaded as a whole, and part saved, by transferring the whole peril to another part.*

Barnard v. *Adams, supra,* 10 How. at 305, 306, 51 U.S. at 322. (Emphasis added.)

The following holding in *Barnard, supra,* governs our case:

> It is true that she has not been wrecked or lost, as she inevitably would, had she been . . . foundered on the rocks . . . but she has voluntarily (been damaged) while (she) brought safety to the cargo.

Barnard v. *Adams, supra,* 10 How. at 307, 51 U.S. at 323.

The Supreme Court further explained that, to adopt the arguments now urged by defendants' insurance companies, would overturn the entire theory of General Average.

It is evident from these propositions, that the assertion so much relied on in the argument, namely "that if the peril be inevitable there can be no contribution," is a mere truism, as the hypothesis of the case requires that the common peril, though imminent, shall be successfully avoided. Those who urge it must therefore mean something else. *And it seems, when more carefully stated, to be this, "that if the common peril was of such a nature, that the "jactus," or thing cast away to save the rest, would have perished anyhow, or perished 'inevitably,' even if it had not been selected to suffer in place of the whole, there can be no contribution." If this be the meaning of this proposition, and we can discover no other, it is a denial of the whole doctrine upon which the claim for general average has its foundation.* For the master of the ship would not be justified in casting a part of the cargo into the sea, or slipping his anchor, or cutting away his masts, or stranding his vessel, unless compelled to it by the necessity of the case, in order to save both ship and cargo, or one of them, from an imminent peril which threatened their common destruction. The necessity of the case must compel him to choose between the loss of the whole and part; but, however metaphysicians may stumble at the assertion, it is this forced choice which is necessary to justify the master in making a sacrifice (as it is called) of any part for the whole. *Hence the answer of every master of a vessel, when examined, will be, "I considered the destruction of both ship and cargo 'inevitable,' unless I had thrown away what I did."* "The goods thrown away would have gone to the bottom anyhow." * * * *But the right to con-*

> *tribution is not made to depend on any real or presumed intention to destroy the thing cast away, but on the fact that it had been selected to suffer the peril in place of the whole, that the remainder may be saved.*

Barnard v. *Adams, supra,* at 10 How. 303, 304, 51 U.S. at p. 320. (Emphasis added.)

In our case the method of salvage (the sacrifice) chosen by the Master allowed the bottom damage to occur. The bottom suffered instead of the whole venture.

The specific damage suffered by the Beauregard could have been avoided had a different method of salvage been attempted or had the tow line not parted. The damage had not occurred for all intents and purposes once the vessel grounded. It was not particular average, but was a General Average sacrifice.

POINT III

The avoidable-unavoidable test is the present method used to differentiate between general and particular average.

This thread of reasoning was traced through the case law and commentators in Point I of the appellant's brief. Defendants' attempt to reverse this law is another desperate attempt to avoid their just contribution toward the sacrifice made by Sea-Land to save defendants' property.

The following hypotheticals posed by the United States Supreme Court in *Barnard* v. *Adams, supra,* 10 How. at 304, 305, 51 U.S. at 321, support the fact that the damage to the bottom of the SS BEAUREGARD was avoidable and thus a simple classic, General Average sacrifice.

> Take the case of *Caze* v. *Reilly*. A vessel is completely surrounded by the enemy's cruisers. It is impossible to save both ship and cargo from capture and a total loss. A part or the whole of the cargo is thrown overboard, and thus the vessel escapes. This is an admitted case for contribution. And it is no answer to the claim of the owners to say, "Your cargo was 'inevitably' lost; as it was situated it was worthless, and consequently you sacrificed nothing for the common benefit. . . . But suppose, as in the case referred to, the ship cannot be saved by casting the cargo into the sea, but the cargo, which is of far greater value, can be saved by casting the vessel on the land, or stranding her. Is it any answer to her claim for contribution to say, that "her loss was 'inevitable,' she was in a better situation on the beach than in the hands of the enemy, or at the bottom of the sea, or wrecked upon rocks, and therefore there was no such sacrifice as would entitle her to contribution?" We cannot comprehend why this argument should have no weight in the first case (which is an admitted case of contribution in all the books), and yet that it should be held as a conclusive obstacle to the recovery in the latter, . . .

In the above examples, damage to either the ship or cargo was avoidable. If one was sacrificed in favor of the other, that sacrifice was a General Average act. It makes no difference that the damage would have occurred had nothing been done. Of course it would have occurred, since it, as well as the rest of the vessel and cargo must have been in peril before General Average could exist.

Summary

The bottom damage was the proximate cause of the line breaking. It was a risk the Captain took intentionally. The vessel did not break up in position "B" and the vessel and cargo were saved. The cargo underwriters should not now walk away with their premiums at the vessel's expense.

All the witnesses were in agreement that if the line had not parted, the vessel and cargo would have been saved without further loss.

In fact, if the tug had not refused to take another line, the vessel would not have gone to position "B" (342a, 347a). It is also beyond question that beginning with the calling of the tug boat and until the vessel was finally freed at 2108, May 8, a continuous effort was made at great expense to the shipowner to save the vessel and cargo. (E-9, Log Book, E-112, Report of Salvage Co.)

It should be noted that Position B was only one of the several groundings the vessel experienced during the overall salvage effort (120a-121a). The bumping and grinding took its toll on the vessel's bottom as she was pulled, pushed, rolled and rocked to get her off. Although jettisoning the containers were considered, no cargo was sacrificed and the whole loss fell on the ship (123a, 143a). Similarly, several lines broke before the ship and cargo were finally saved. The trouble with the Judge's ruling is that he lost sight of the overall operation, and he lost sight of the fact that, but for the risk the Captain took in calling for the tow, the vessel and cargo might still be lying there as a wreck. It was the freeing of the bow from the rocks and the clearing of the vessel from its dangerous position against the tanker,

that set the stage for the final victory. The temporary grounding at position B—and other temporary groundings, were all skirmishes with the elements in a battle being waged to save the vessel and cargo. The battle was won and the cargo came out unscratched. The vessel suffered some wounds but lived to sail another day.

At the end of the trial on July 17, 1975, the Judge seemed to have a grip on the case when, after hearing the live witnesses (Mello, Myerson, Feliz and Reineke), but before reading depositions, he outlined how he saw the case "at the moment" while the impression made by the live witnesses was still fresh on his mind (297a). He rejected defendants' contention that the shipowner had used a rotten rope to tow the vessel by correctly pointing out that the rope had "pulled the ship against the wind for some feet or yards for a period of ten minutes" before it parted (298a). He rejected the testimony of defendant's only expert (Reinecke-Marine architect/engineer) who claimed that the vessel needed a large rudder or a more powerful engine (299a-300a). Thus he found no unseaworthiness either in the rope or the vessel. All these views were repeated in the final decision. But as to the bottom damage, he reversed the views he expresed when the case was fresh in his mind. At the trial he said he would probably find (1) that the ship was "stuck with its bow in", and (2) that on the basis of Ganley's testimony, "it could have been kept in that position for an appreciable length of time", (3) that the Captain acted wisely in trying to get her towed off the rocks, (4) that in saving the vessel and coincidentally the cargo, the act was General Average under American law, and that "pulling off materially increased the possibility

of the shift from A to B" (304a). The Judge summed up his feeling at that time as follows (304a-305a):

> It would be absolutely foolhardy from a ship's point of view for the master to have taken any other course, to try to either do nothing or drive it in, which was an option open to him in the sense it was physically possible but it would have been in my judgment; unless I am correct, a foolhardy thing for him to have done.

What happened during the long period of time from the trial, July 17, 1975, until the Opinion was handed down February 10, 1976, we do not know. The Opinion does appear to be rather sketchy and perhaps the case grew stale in the Judge's mind.

The Opinion leaves anyone knowing the case with the feeling that cargo underwriters have been handed a tremendous windfall and that somehow justice did not prevail. Instead of sharing the loss—let alone getting a reward—the carrier who succeeded in saving millions of dollars of cargo, at the expense of damage done to its own ship, is left to bear the damage alone.

General average, that is to say expenditures made "for the common safety", is the oldest method of apportionment of risks, even older than marine insurance. It recognizes that in the course of saving property of a common venture from disaster, one person's property may be sacrificed in the effort to accomplish the goal. General Average reallocates the loss so that all who benefitted from the sacrifices share in a fair way, the loss that was suffered for the common good. The Opinion here, perhaps written in haste,

confused, and incorrect as it was even on its face as to the conceded general average, needs to be set straight.

If a host of cargo underwriters can so easily walk away from a clear cut and logical responsibility, refusals to share in General Average losses will be encouraged and the door opened to a new line of litigation, in an area where General Average Adjuster's Opinions have in the past been respected and dispositive.

CONCLUSION

The portion of the opinion below, which denied that damage sustained by the S.S. BEAUREGARD during salvage operations after a tow line parted, was a General Average sacrifice, should be reversed. Sea-Land Service Inc., *et al.* should be awarded the stipulated sum of $404,002.26, plus interest and costs.

Respectfully submitted,

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